

STATE CONSTITUTIONAL LAW: AN ATTORNEY GENERAL'S PERSPECTIVE*

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I share with you today the perspective of a state Attorney General on state constitutional law. I do not believe I over generalize when I suggest that every state Attorney General is, and must be, alert to the increasing reliance by state courts on state constitutions; a trend that Associate Justice William Brennan has called "[t]he most important development in constitutional jurisprudence of our times."¹

Indeed, the significance of state constitutional law to state attorneys general was recently emphasized by an initiative of the National Association of Attorneys General. Supported by a grant from the State Justice Institute, state attorneys general have formed a national clearinghouse to monitor, study, and contribute to emerging state constitutional law. I have the privilege of serving on the Board of Governors for the project along with my fellow attorneys general from Connecticut and North Carolina, Justice Shirley Abrahamson of the Wisconsin Supreme Court, Justice Stanley Mosk of the California Supreme Court, and Retired Senior Judge W. Ward Reynoldson of the Iowa Supreme Court. My appointment, I am sure, owes less to my credentials than to the recognition that Vermont is in the forefront of developing state constitutional law.

The interest of attorneys general in state constitutional law signifies a recognition that the public is best served by an attorney general who takes an active role in shaping, or at least sharpening, the debate over the proper role of a state constitution. It is the distinctive responsibility of an attorney general that enables the attorney general to play a unique part in the unfolding pageant of state constitutional jurisprudence. Unlike the private attorney who is duty bound to represent the narrower interest of his or her client, or the judge who must react to rather than initiate a cause of action, the attorney general has a broader responsibility and hence

* This is the text of a speech which Attorney General Amestoy gave at Vermont Law School on November 17, 1987.

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1. Quoted in NAT'L L.J., Sept. 29, 1986 (Special Supplement). See also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

a broader opportunity to advance state constitutional law.

Justice Michael Gillette of the Oregon Supreme Court described the role of an attorney general in this manner:

We expect from you fearless advocacy of what is right . . . the privilege of just fighting for its own sake may belong to anybody in the legal profession, but I submit respectfully and urgently that it doesn't belong to the [attorney general]. You are only entitled to fight when the fight protects or . . . vindicates the public interest²

Justice Gillette's description presents a tall order; especially where an attorney general has the authority to involve the office in a wide range of matters that interest the public.

In Vermont, for example, the attorney general has statutory authorization to appear for the state in all "civil or criminal causes in which the state is a party or is interested when, in his judgment, the interests of the state so require."³ It is, in fact, the capacity to participate in criminal as well as civil matters, that contributes to an institutional ambivalence for the office of attorney general about state constitutional claims. For if, as more than one writer has put it, "[a] state constitution can be used as a sword," one's enthusiasm for its use depends on whether one is swinging the sword or catching the blade. The Vermont Attorney General's Office has done both.

A recent survey of individual rights litigation, based on state constitutional claims, found that the claims are raised most frequently in criminal justice cases.⁴ The survey corresponds with our experience at the Vermont Attorney General's Office where the bulk of our work on state constitutional claims has been in criminal law.

Because a part of my responsibility as attorney general is to enforce the criminal law, I would be less than candid if I told you that I welcomed innovative state constitutional arguments on behalf of convicted defendants. This is particularly true because it is doubtful that the Vermont Supreme Court shares the view of the

2. Remarks of Justice Michael Gillette, Associate Justice, Oregon Supreme Court, to a meeting of The National Association of Attorneys General, in Coeur D'Alene, Idaho (June 9, 1987).

3. VT. STAT. ANN. tit. 3, § 157 (1985) (emphasis added).

4. Collins, Galie & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599 (1986).

Georgia Supreme Court. As Georgia Supreme Court Justice George Smith wrote:

The Supreme Court of Georgia does not favor the use of State Constitutional law in view of the fact that in the criminal law field especially, the State Constitution gives the individual more protection than does the Federal. The field of free speech is the only field in which our Court follows the State Constitution, and it is more protective than the Federal. *Strangely enough, lawyers in [Georgia] have not realized that you can depend upon the State Constitution If they did, we would have some interesting opinions coming from our Supreme Court in its effort to ignore the more protective State Constitution.*⁵

In Vermont, of course, lawyers have not been oblivious to the state constitution, particularly since *State v. Jewett*,⁶ wherein the late Justice Thomas Hayes eloquently heralded the “unparalleled opportunity [of Vermont lawyers] to aid in the formulation of state constitutional jurisprudence”⁷ Nor have we lacked for imaginative state constitutional theories. Even before *State v. Jewett*, one attorney seeking to block the transfer of his client to a prison outside Vermont, argued that section 64 of chapter II of the Vermont Constitution prohibited the move.⁸ His argument was that the language of section 64 provides for “visible punishments of long duration” during which “all persons at proper times ought to be permitted to see [prisoners] at their labor” thereby entitling his client to be exposed to public view within Vermont.⁹ The lawyer presented the court with a creative state constitutional argument. However, since creative is not the same as persuasive, he did not prevail.

Even so, others have been both creative and persuasive. No case more starkly portrays the debate over the application of the Vermont Constitution to the criminal law than *State v. Brunelle*.¹⁰ Let me spend a little time on *Brunelle*. Because my purpose is to give you an insight into an attorney general's perspective rather than a survey of Vermont constitutional law, *State v. Brunelle* is a

5. *Id.* at 609-10 (emphasis added).

6. 146 Vt. 221, 500 A.2d 233 (1985).

7. *Id.* at 224, 500 A.2d at 235.

8. *Battick v. Stoneman*, 421 F. Supp. 213 (D.Vt. 1976).

9. *Id.* at 230 n.15.

10. 148 Vt. 367, 534 A.2d 198 (1987).

useful vehicle.

In *Brunelle*, the defendant was convicted of one count of operating a motor vehicle while under the influence of intoxicating liquor (DUI) with death resulting, and a second count of DUI with injury resulting.¹¹ The investigating officer obtained a blood sample from the defendant without giving the *Miranda* warning. The trial court suppressed the results of the blood alcohol content (BAC) test.¹²

The State gave notice of its intent to use the BAC test to impeach the defendant if he testified at trial.¹³ The defendant then filed a motion *in limine* in which he sought to have the BAC test results suppressed for all purposes.¹⁴ The court denied the defendant's motion and ruled that if, during his testimony, the defendant denied on direct or cross-examination that he had been under the influence of intoxicating liquor, the state could then introduce the BAC test to impeach him as a witness.¹⁵ As a result, the defendant did not testify and was subsequently convicted on both counts.¹⁶

On appeal, the defendant claimed that the self-incrimination and due process clauses of the Vermont Constitution prohibited the introduction of the suppressed evidence for any purpose.¹⁷ At issue was whether the Vermont Supreme Court should adopt the reasoning of the United States Supreme Court in *Harris v. New York*¹⁸ and *United States v. Havens*.¹⁹

Harris established that evidence obtained in violation of *Miranda* could be used to impeach the testimony of a defendant given on direct examination. The Supreme Court succinctly described its rationale in *Harris* by stating: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury."²⁰ In *Havens*, the *Harris* doctrine was extended to al-

11. *Id.* at 348, 534 A.2d at 199.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 348, 534 A.2d at 199-200.

16. *Id.* at 348, 534 A.2d at 200.

17. *Id.*

18. 401 U.S. 222 (1971).

19. 446 U.S. 620 (1980).

20. *Harris*, 401 U.S. at 225 (citing with approval *United States v. Knox*, 396 U.S. 77 (1969)).

low impeachment based on testimony first elicited on cross-examination.²¹

In *Brunelle*, the defendant argued that the *Harris-Havens* logic chilled a defendant's right to testify.²² The state argued that only the defendant's ability to commit perjury was hindered, not the right to testify.²³ The Vermont Supreme Court decided that the admission of previously suppressed evidence to impeach credibility implicates a defendant's constitutional right to testify in his own defense.²⁴ The court held that the due process clause of the Vermont Constitution prohibits the state from introducing evidence for impeachment purposes *except* when it is clear that the defendant has testified during direct examination "in a manner contradictory to the suppressed evidence."²⁵

Justice Gibson's decision in which Chief Justice Allen and Justice Hill joined, unleashed perhaps the most acerbic dissent ever authored by a Vermont Justice.²⁶ I commend Justice Peck's dissent to your attention because it illustrates the clash of principles that are at the heart of the so-called "extension of individual rights"—particularly in criminal cases. In dissenting, Justice Peck stated that "this Court [reads] into our State Constitution language which is simply not there . . . such results are whim-motivated and result-oriented."²⁷ He further elaborated that "where there are no meaningful distinctions between the relevant wording of the two constitutions, the majority says there is one. This is an extract of thin air. The majority . . . has simply plucked a legal bunny from its hat."²⁸

More significant than the tone of the dissent is, I believe, Justice Peck's accurate evaluation of the majority's analysis. Notwithstanding the *Jewett* decision, in which the Vermont Supreme Court suggested several approaches for analyzing a state constitution,²⁹ Justice Peck observed that "the majority in this case has made no valid attempt to analyze the Vermont Constitution."³⁰

21. *Havens*, 446 U.S. at 626.

22. *State v. Brunelle*, 148 Vt. at 367, 350, 534 A.2d 198, 201 (1987).

23. *Id.*

24. *Id.* at 353, 534 A.2d at 202.

25. *Id.* at 353, 534 A.2d at 203.

26. *Id.* at 356, 534 A.2d at 205 (Peck, J., dissenting).

27. *Id.* at 360, 534 A.2d at 207.

28. *Id.* at 362, 534 A.2d at 208.

29. *State v. Jewett*, 146 Vt. 221, 225-28, 500 A.2d 233, 236-38 (1985).

30. *Brunelle*, 148 Vt. at 361, 534 A.2d at 207 (Peck, J., dissenting).

I respectfully suggest that an objective reading of the majority's decision lends support to Justice Peck's conclusion. I hasten to add that "the result" I preferred is the *Harris-Havens* doctrine.³¹ But, of course, the point here is not which result one prefers but rather the integrity of the constitutional analysis.

The most important language in Justice Hayes's *Jewett* opinion, to my mind at least, is the following: "It would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the decisions of the United States Supreme Court. Our decisions must be principled, not result-oriented."³²

As in other recent cases recognizing state constitutional claims, newspaper headlines reporting the *Brunelle* decision proclaimed "Individual Rights Expanded." Let me suggest that a misleading impression can be conveyed by the headlines reporting Vermont Supreme Court decisions about the Vermont Constitution. It is useful to keep in mind that any so-called "expansion" of individual "rights" must inherently affect the "rights" of others. Here is what Justice Peck had to say:

Defendants in criminal cases have a right to a fair trial, but in their zeal to protect that right, too many courts long ago lost sight of the fact that *fairness is, in a sense, a two-edged sword*. We must not divorce the concept of the word "state" from the people who *are* the state. The Preamble to our Federal Constitution begins with the phrase "We the people." These people are much more than a sort of collective "person." Each one is an individual, a citizen of the state and nation created by their ancestors; as much so as a defendant. They have the right to be secure in their homes and possessions; to be free to walk the streets alone at any hour of the day or night without fear of the violence which is so prevalent in today's society; to drive in their automobiles, also without fear of irresponsible drunks behind the wheel of another vehicle; to send their children to school free from the seductive blandishments and pressures of peers, drug dealers and pushers, and from those with a propensity for child abuse.³³

31. See *supra* notes 18-21 and accompanying text.

32. *Jewett*, 146 Vt. at 224, 50 A.2d at 235. See also Pollack, *State Constitutions As Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 717 (1983), quoted in *Jewett*, 146 Vt. at 224-25, 500 A.2d at 235-36.

33. *Brunelle*, 148 Vt. at 357, 534 A.2d at 205 (Peck, J., dissenting) (emphasis added and in the original).

The debate among Justice Peck and his brethren should not be read merely for the sport of trying to figure out which justice is a "liberal" and which is a "conservative." Those labels are, in my judgment, invariably misleading. One cannot, however, escape the reality that decisions interpreting state constitutional law have an impact on people. I respectfully suggest that those who have the responsibility for a result have an equal responsibility to be sensitive to its effects.

Recently, for example, the Office of Attorney General appeared before the Vermont Supreme Court in a case in which the defendant had been convicted of sexual assault on an eight year old girl. At issue was whether the trial court erred in allowing into evidence a statement the little girl made to her doctor when she was examined for physical injury. The defendant argued that chapter I, article 10 of the Vermont Constitution prohibited the use of the girl's statement.³⁴

Leaving aside for a moment the respective legal arguments, it is, I believe, fair as a matter of public policy to ask: "Whose rights will be protected if the conviction is reversed; whose liberties?" Those are questions that an attorney general must continually ask if he or she is to be true to Justice Gillette's admonishment that the attorney general is entitled to fight only when the fight protects or vindicates the public interest.³⁵

Although I have spent a considerable portion of these remarks cautioning against uninformed enthusiasm for state constitutional claims, it would be erroneous to conclude that attorneys general are bystanders to the state constitutional law revolution. Indeed, I believe that reliance on state constitutions can advance the public interest. Two caveats should be noted. First, "public interest" depends upon one's perspective. These arguments are in the public interest from my perspective. Secondly, in the limited context of this speech, I can only briefly highlight potential state constitutional claims.

The Vermont Office of the Attorney General has advanced state constitutional claims, both successfully and unsuccessfully. Like others who have taken a fresh look at Vermont's Constitution, I see particularly fertile ground in chapter I, article 4, entitled

34. *State v. Gallagher*, No. 86-174 (Vt. argued Sept. 9, 1987).

35. See *supra* text accompanying note 2.

“Remedy at law secured to all,” which states:

Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.

In an employment discrimination suit brought on behalf of several women who were discriminated against and sexually harassed by their employer, the Vermont Attorney General's Office argued that article 4 provided the women with a cause of action for damages against their employer.³⁶ The employer maintained that the \$500 fine provided by the statute was the only remedy available to these women for a violation of the statute. But, we sought damages for the women for the emotional distress that they had suffered as a result of the sexual harassment and argued that article 4 provided a right to this remedy. The court held that awards for emotional distress should be available in these cases and wrote:

We agree with the plaintiff, State of Vermont, that the State has a [matter of] strong public policy in protecting the rights of individuals to be free of employment discrimination. That public policy would be a weak right indeed if people who suffered employment discrimination prior to 1976 were denied any relief for injuries that have scarred their emotions and their lives.³⁷

We were less successful in *State v. Pittsfield Pipers*,³⁸ an age-discrimination case also brought under Vermont's Fair Employment Practices Act, in arguing that the state was entitled to a jury trial under chapter I, article 13 and chapter II, section 38. This case presented mixed claims for legal and equitable relief and was decided after *Soucy v. Soucy Motors, Inc.*³⁹ *Soucy* held that a whiff of equity brought the entire case into equity, thereby effectively eliminating a right to a jury.⁴⁰ But, *Pittsfield Pipers* was also decided before the effective date of Rule 39(d) of the Vermont

36. *State of Vermont v. Champlain Cable Corp.*, No. 5633-79 CnC (Chit. County Super. Ct. Oct. 7, 1983).

37. *Id.* at 118-19.

38. *State v. Pittsfield Pipers, Inc.*, No. 85-160 (Vt. Dec. 9, 1986).

39. *Soucy v. Soucy Motors, Inc.*, 143 Vt. 615, 471 A.2d 224 (1983).

40. *Id.* at 617, 471 A.2d at 225.

Rules of Civil Procedure, which specifically grants the right to a jury trial whenever there are mixed claims.⁴¹

Let me maintain two other affirmative state constitutional claims that seem worth exploring. The Attorney General's Office has not yet been a party in a case relating to the trial court's sealing of affidavits. In *State v. Tallman*,⁴² and *Greenwood v. Wolchik*,⁴³ the State's Attorney has been the prosecuting authority. To the best of my knowledge, those seeking access to the probable cause affidavits have not advanced the textual argument that article 13 of the Vermont Constitution provides a higher degree of access because of the "transactions of government" language.

Briefly, article 13 of the Vermont Constitution when first drafted in 1777 stated: "That the people have a right to freedom of speech and of writing and publishing their sentiments, and therefore the freedom of the press ought not to be restrained."⁴⁴ In 1785, this section was amended to read: "That the people have a right to freedom of speech and of writing and publishing their sentiments, *concerning the transactions of government*, and therefore the freedom of the press ought not to be restrained."⁴⁵ There is no branch of government in which the "transactions" are as important as in the judicial branch. Restricting access to those transactions restrains the ability of persons to express "their sentiments."

Finally, I believe that *the state* has a basis for claiming a speedy trial. Chapter II, section 28 of the Vermont Constitution provides that: "The Courts of Justice shall be open for the trial of all causes proper for their cognizance; and justice shall be therein impartially administered, without corruption or unnecessary delay."⁴⁶

41. VT. R. CIV. P. 39(d) (Supp. 1987) provides:

Whenever a claim for legal relief is joined with a claim for equitable relief in the same complaint or by counterclaim, cross-claim or third-party complaint, there shall be a right to trial by jury on the claim for legal relief triable by right by jury if demanded in accordance with these rules. In the furtherance of convenience or to avoid prejudice, the court may order a joint trial of all legal and equitable claims, with separate fact-finding by the jury and by the court or, alternatively, may order separate trials for the legal and equitable claims.

42. 148 Vt. 465, 537 A.2d 422 (1987).

43. No. 87-423 (Vt. Feb. 5, 1987).

44. VT. CONST. ch. I, art. 13.

45. *Id.* ch. I, art. 13 (1785) (emphasis added).

46. VT. CONST. ch. II, § 28 (1974).

I am particularly concerned about the inordinate amount of time it sometimes takes to schedule a trial for a white collar defendant. The Attorney General's Medicaid Provider Fraud Unit, which I once headed, has successfully prosecuted two dozen white collar defendants. Our only loss came when a judge dismissed felony charges which had been pending against a doctor for twenty-two months. Even though the judge conceded the delay was caused not by the state but rather by the failure of the courts to schedule the case, charges were dismissed.⁴⁷ When a delay has not caused demonstrable harm to the defendant, I would argue that the right to "justice impartially administered without . . . unnecessary delay,"⁴⁸ provided by the Vermont Constitution, extends to citizens of the state represented by prosecutors as well as citizens represented by defense lawyers.

I have today attempted to highlight state constitutional issues from one attorney general's perspective. Justice Gillette, whom I quoted earlier,⁴⁹ recently reminded me of the ancient Chinese blessing: "May you live in interesting times." No times could be more interesting for lawyers than these times. I welcome your participation.

47. *State v. Engisch*, No. 705-2-85 CnCr (Chitt. County Dist. Ct. Dec. 16, 1986).

48. VT. CONST. ch. II, § 28 (1974).

49. *See supra* note 2.